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Issue Date: 08 May 2003

CASE NO.: 2001-LHC-3177, 2002-LHC-1131

OWCP NO.: 5-103480, 5-106358

In the Matter of:

WILLIE BOND,
Claimant,

v.

NEWPORT NEWS SHIPBUILDING
AND DRY DOCK COMPANY,
Employer.

Appearances:

Ralph Rabinowitz, Esq.
For Claimant

James Mesnard, Esq.
For Employer

Before: FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding arises from claims filed by Willie Bond ("Claimant") for benefits under the Longshore and Harbor Workers' Compensation Act ("the act"), as amended, 33 U.S.C. 901 et seq. Claimant seeks permanent total disability compensation based on a 1998 back injury and 1999 bilateral wrist injuries. Newport News Shipbuilding and Dry Dock Co. ("Employer" or "the shipyard") contests the wrist claim on the grounds that Claimant's wrist injuries (bilateral carpal tunnel syndrome) are not work related. Employer further argues that suitable alternative employment is available to Claimant who is, as a result, only partially disabled.

A formal hearing was held in this case before me on December 13, 2002 in Newport News, Virginia, at which both parties were given a full opportunity to present evidence and argument as provided by law and regulations. At the hearing, Claimant submitted exhibits CX 1-13, all of which except CX 2 were admitted into evidence.[1] Employer proffered E 1-78, all of which were admitted into evidence except E 7 and E 77.[2] The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties have stipulated to and I find as follows:

1. That an employer/employee relationship between the parties existed at all relevant times;

2. That the parties are covered by the act;

3. That, on January 22, 1998, Claimant sustained an injury that arose out of and in the course of his employment with the shipyard;

4. That Claimant gave Employer timely notice of injury and filed timely claims for compensation for the January 22, 1998 injury and the alleged June 1, 1999 injury;

5. That Employer filed timely first reports of accident and timely notices of controversion for the June 22, 1998 injury and the alleged June 1, 1999 injury;

6. That Claimant's average weekly wage at the time of the January 22, 1998

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[1]The following abbreviations are used as citations to the record:

CX - Claimant's exhibits
E - Employer's exhibits
Tr. - Transcript of the hearing

[2] Although I reserved decision at the hearing, I hereby admit E 77 because it pictures Claimant's activities even though Claimant is not the principal actor in the videotape (see Tr. 176).

injury is $633.84, yielding a compensation rate of $422.56.

7. Because of his injury, Claimant cannot return to his previous job at the shipyard.

(Tr. 6-8).

ISSUES

1. Is Claimant's bilateral carpal-tunnel syndrome work related?

2. Is Claimant totally disabled or is there suitable alternative employment in his area which he could have obtained and performed?

SUMMARY OF EVIDENCE

A. Testimony of Amy Lanman-Bouchard

Ms. Lanman-Bouchard is a vocational case manager and vocational supervisor for Genex Services, which was formerly Resource Opportunities Inc. (Tr. 25-6). Previously, Ms. Lanman-Bouchard supervised Bill Kay and Cathy Major on the Bond matter and took over the Bond matter when it was referred to the Expediter program (Tr. 27). The Expediter program is subsidized employment (Tr. 27). Usually the former employer will reimburse an employee's first 500-800 hours of employment with Expediter (Tr. 28). After the first 500-800 hours, the hiring employer can make a decision as to whether it is going to continue to employ the worker or not (Tr. 28).

Expediter referred Mr. Bond's case to Decenzo Personnel Services, which apparently sent him applications and other material, but he never returned the application or other material, and he was not offered the position as a telephone surveyor with Decenzo (Tr. 29). Decenzo said that, if Mr. Bond would return his application and complete the phone interview, he would be offered the position (Tr. 29-30). The position was telephone surveyor contacting businesses all over the country to verify addresses and name information; to make sure that the surveyees still sell a particular product or service; and to determine whether various companies would be in the market for a particular product or service (Tr. 30). Mr. Bond did not return any paperwork or submit an application to Decenzo (Tr. 32). Dr. Molligan signed a statement that Mr. Bond could

physically perform the phone-surveyor job (Tr. 35), which paid $7.00 per hour for 40 hours a week (Tr. 37).

Ms. Lanman-Bouchard originally contacted Expediter in regard to Mr. Bond (Tr. 38). Expediter sent a 14-page manual called, "Telecommunications Employment Opportunities" (Tr. 39). The manual indicates that the employee should average five to twelve completed surveys per hour (Tr. 40). Newport News Shipbuilding was going to subsidize the first 500-800 hours of employment at the full $7.00 per hour (Tr. 40).

Ms. Lanman-Bouchard did not try to find out what Decenzo's Personnel Services paid for the $7.00-per-hour position back at the time of Claimant's back injury (Tr. 41). The application for employment, a W-4 form, the income tax information and all the other documents were sent to Mr. Bond but were never sent back (Tr. 42-3). Nevertheless, an interview was scheduled for Mr. Bond for December 18, 2001 (Tr. 43). Ms. Lanman-Bouchard does not know whether or not Expediter actually called Mr. Bond for the interview, but it did send the paperwork to him several times prior to the scheduled interview (Tr. 43). There never was an interview (Tr. 43), and, in spite of the fact that no documents were returned, no applications filled out, no forms filled out, and no interviews conducted, Claimant was offered a phone surveyor position at $7.00 an hour (Tr. 43).

Ms. Lanman-Bouchard never asked Dr. Molligan, who was treating Mr. Bond's back, to provide her with a list of Bond's work limitations or restrictions (Tr. 44). No one ever asked Dr. Molligan to provide permanent work restrictions for Mr. Bond (Tr. 44).

Mr. Bond has a verbal IQ of 85, which does not indicate extensive verbal skills (Tr. 47-8). Ms. Lanman-Bouchard does not know whether the businesses that are supposed to be called by the telephone surveyor know that the person is going to be calling them or not (Tr. 49). Ms. Lanman-Bouchard assumes that they would be cold calls, which would require verbal skills (Tr. 49). Ms. Lanman-Bouchard has not seen the text of the surveys that the phone solicitors are supposed to complete 5-12 times an hour. Also, Ms. Lanman-Bouchard does not know whether the people on the list to be called are told that they will be solicited to buy products and services (Tr. 50). There are no direct transferable skills from the painter job at the shipyard to the phone job with Expediter (Tr. 54).

B. Testimony and labor-market survey of William Kay

Mr. Kay also works for Genex and has been stationed at the shipyard for years (Tr. 62). For his labor market survey concerning Mr. Bond, Mr. Kay used Dr. Kerner's restrictions of May 10, 1999 (Tr. 65). Mr. Kay opined that Mr. Bond could work at

sedentary-to-light work (Tr. 65). Mr. Kay was unable to get any job descriptions reviewed by Dr. Molligan, Claimant's treating orthopedist, for over two years (Tr. 65-6). Mr. Kay knew that Claimant lived in Gates County, North Carolina area but did not know exactly where he lived because Claimant's mailing address is a post office box (Tr. 68). Dr. Molligan only reviewed and approved the Expediter position (Tr. 71). Mr. Kay concluded that the average wage for the jobs that he located was $5.75 an hour or $206.00 a week (Tr. 72). He did not try to adjust the job earnings to 1998 dollars (Tr. 72-3). The shipyard's position is that Mr. Bond's earning capacity is $7.00 per hour (Tr. 73-4). Mr. Kay's labor-market survey (E 57 at 2) was completed and dated June 17, 2002. The survey executive summary (page 2) states: "Copies of the job descriptions were forwarded to Dr. Molligan for review and response." Mr. Kay sent other job descriptions to Dr. Molligan for review and response but received no reply.

The labor market survey also states, "Willie Bond is unable to drive long distances due to his medical condition" (Tr. 78). Mr. Kay has no idea how big Gates County, North Carolina is (Tr. 79). The survey relied on Dr. Kerner's restrictions of May 10, 1999 (Tr. 79). After May 10, 1999, Claimant had undergone another operation with another surgeon (Tr. 80). Mr. Kay did not try to get work restrictions from the doctor who did the second surgery, Dr. Magness (Tr. 80). Mr. Kay never tried to get work restrictions from Dr. Molligan (Tr. 80). Mr. Kay assumed that Mr. Bond could only do sedentary work (Tr. 80). Claimant's verbal and math skills were at about sixth-grade level (Tr. 82). Mr. Bond's GED score was one for math and verbal on a scale of one to six, one being the lowest (Tr. 82). Mr. Kay did not find out if Mr. Bond knew how to work a cash register (Tr. 82). Mr. Bond told Mr. Kay that he could only drive 20 minutes before the discomfort prevented him from driving further (Tr 85). Mr. Kay noted that Mr. Bond did not present well since he had braces on his wrists and used a cane (Tr. 85).

From the Gates County line to Ahoskie, NC and Suffolk, VA, the travel time is 40 minutes (Tr. 86). There were no current openings at Goodwill Industries in Suffolk or Food Lion in Murfreesboro, NC, when Mr. Kay last checked (Tr. 85-6). The Goodwill Industries jobs require lifting of 20 pounds, and Dr. Molligan never indicated that Bond could lift 20 pounds (Tr. 86). The Goodwill Industries job also required stooping (Tr. 86). The door greater job at Wal-Mart in Ahoskie, NC required working with body bent over at waist (Tr. 86).

Mr. Kay did not find out where Claimant lived, just the general area where he lived (Tr. 93). Mr. Kay recalled that Dr. Ross had stated that Claimant could drive an hour without suffering pain (Tr. 94).

Mr. Kay surveyed jobs located within approximately one hour's drive of where Claimant lives (Tr. 68-9, 93-4). This complies with Dr. Kerner's and Dr. Ross' assessments. Mr. Kay met with Claimant on December 7, 2000 for a vocational

assessment (Tr. 59-60; E 57 at 3). Mr. Kay had access to Claimant's medical records, and he administered vocational tests.

Mr. Kay contacted all of the prospective employers identified in his labor-market survey (Tr. 67). He has actually placed injured people with some of these employers (Tr. 68). He identified ten positions which were within Claimant's capabilities and which were available between January 1999 and June 2002. These included five customer service positions (Expediter, Goodwill Industries, Wal-Mart (two positions) and Waste Industries), two security guard positions, and three cashiers' positions (E 57 at 10-13). Mr. Kay's June 17, 2002 labor-market survey reflected jobs that paid an average of $5.75 per hour or $206.00 per week. Mr. Kay stated that Claimant could earn $7.00 per hour or $280.00 per week (E 57 at 13).

Mr. Kay identified the following positions:

EMPLOYER	LOCATION	DUTIES	HOURLY WAGE
1. Decenzo Personnel Specialists (via Expediter)	Claimant's home	Telephone Surveyor	$7.00
2. Goodwill Ind.	Suffolk, VA	Donation Attendant	$5.15
3. Wal-Mart	Ahoskie, NC	Greeter	$6.25
4. Waste Industries	Greenville, NC	Attendant	$5.15
5. Wal-Mart	Suffolk, VA	Greeter	$6.25
6. Security Services of America	Various Locations in Northeast NC	Unarmed Guard	$6.00
7. Alpha Security Guard & Patrol	Ahoskie, NC	Unarmed Guard	$6.00
8. Holiday Food Store - Amoco	Suffolk, VA	Cashier	$5.25
9. Godfather Food House - BP	Suffolk, VA	Cashier	$5.15

10. Food Lion	Murfreesboro, NC	Cashier	$5.15

(E 57, E 75).

The positions in question were reviewed by Dr. Hersh, the hand specialist (E 65); Dr. Kurowski, Claimant's family physician (E 66, E 67); Dr. Kerner, Claimant's first treating surgeon (E 60); and Dr. Ross, a physiatrist (E 63 at 9; E 75). Dr. Kerner did not approve one of the security guard jobs (E 60 at 5). Dr. Ross did not approve one of the Wal Mart greeter positions (E 75 at 4) and a position at Food Lion (E 75 at 11). Otherwise, all of the jobs were approved by the physicians who reviewed them (Tr. 65, 71).[3]

Mr. Kay updated his labor-market survey on November 22, 2002. Some of the positions which had been open in June of 2002 were no longer available. Others, such as the jobs at the Wal Marts in Suffolk, VA and Ahoskie, NC, still had openings. One of the employers, Alpha Security Guard & Patrol in Ahoskie, had just hired a Genex client in September 2002, and it still had positions available (Tr. 70; E 75).

The Decenzo Personnel Specialists position paid $280.00 per week. The wages paid by the various identified employers averaged $5.75 per hour, or $230.00 per week ($5.75 x 40). This would also be what the jobs paid as of the date of injury (Tr. 72-4).

C. Testimony of Carl Hanbury

Mr. Hanbury has a B.S. degree from Eastern Mennonite University, a masters degree in guidance and counseling from James Madison University and was licensed as a professional counselor in Virginia in 1978 (Tr. 95). He has been certified as a rehabilitation counselor with the Department of Labor, Office of Workers' Compensation Programs since 1990; was admitted as a fellow to the American Board of Vocational Experts in 1991; and since 1992 has been certified by the Commission on Rehabilitation Counselor Certifications as a rehabilitation counselor (Tr. 95).

Mr. Hanbury's previous employment was as working manager for the Virginia Employment Commission in Chesapeake, VA for four years. His report in this case is CX 3 (Tr. 96).

[3] Dr. Molligan approved the position with Expediter (Decenzo) in January 2002. In April 2002, he left Atlantic Orthopaedic Specialists. Claimant remained a patient of that practice group and, as a result, Dr. Molligan declined to review any job descriptions other that the Expediter job (Tr. 65-6, 78; E 78).

Mr. Hanbury met with Willie Bond on June 15, 2002 and tested his arithmetic skills, finding them to be at a fifth-grade level (Tr. 97). Mr. Hanbury tested Claimant's ability to use his hands and wrists with the Perdue Peg Board Test (Tr. 97). The Perdue Peg Board Test revealed that he had poor fine-motor dexterity and poor gross dexterity on both the right and left hands. He was judged poor for assembly tasks. Mr. Hanbury concluded that Claimant could not be employed and that his options in the marketplace are nil (Tr. 97).

In both the records Mr. Hanbury reviewed and interviews with Mr. Bond, Mr. Bond complained of pain in his back which radiated down his legs, and Mr. Bond experienced a degree of pain in his arms and hands with any repetitive activity (Tr. 97).

Mr. Hanbury opined that the Expediter job was not appropriate for Mr. Bond because: 1) Claimant had no transferable skills that would lend themselves to this type of work; 2) he had no experience working with the public; and 3) the job required substantial record keeping (Tr. 101).

Looking at exhibit E 66, Mr. Hanbury opined that the cashier's job was not sedentary work and required standing for about two-thirds of the day (Tr. 102-3).

Mr. Hanbury called Goodwill Industries donation center in Suffolk and talked to Dawn, who identified herself as the manager. Dawn indicated that there were no positions for donation center attendants (Tr. 103-5).

The greeter position at Wal Mart requires social skills such as greeting the public, which Mr. Bond does not have (Tr. 105).

The unarmed security guard job is not a sedentary job (Tr. 105-6) in that it generally requires standing two thirds of the day (Tr. 106).

In Mr. Hanbury's opinion, the cashier jobs are not appropriate for Mr. Bond, whose arithmetic skills are not sufficient, and he would not be able to use the automated cash registers (Tr. 106-7).

In the three cases referred to Mr. Hanbury in 2002 by OWCP, he placed all three workers as well as a fourth worker who had been referred in 2001 (Tr. 108).

To fully qualify for and retain employment, security guards must complete state certification (Tr. 111).

Mr. Hanbury also contacted Waste Industries in Greenville, NC in regard to a job as a convenience center attendant (Tr. 116). Mr. Ken Allison of Human Resources at Waste Industries told Mr. Hanbury that there were no openings for that position but that the position worked seven days on and seven days off and required 12-hour shifts and

fairly extensive standing (Tr. 116). The information that Mr. Hanbury gained about the convenience center attendant job at Waste Industries is different from what is recorded in the shipyard's labor-market survey (Tr. 116-7). The shipyard's labor-market survey about Wal Mart greeter is also inaccurate, as the greeter positions are not available, and the positions, when available, are part time in nature (Tr. 117).

Mr. Hanbury is of the opinion that Mr. Bond is not capable of sedentary employment (Tr. 119).

Based on Mr. Hanbury's experience in administering the Perdue Peg Board Test, he believes that Mr. Bond gave his best effort and was not malingering when he took the test (Tr. 130).

The Expediter position is not competitive employment (Tr. 130). It does not have a DOT (Dictionary of Occupational Titles) number and does not fit any of the 12,700 odd job descriptions in the DOT (Tr. 131).

Mr. Hanbury opined: "Using an analysis that would limit Mr. Bond to sedentary work, his vocational options were reduced to zero" (Tr. 131). Mr. Hanbury does not know of any sedentary entry-level jobs that would be appropriate for Mr. Bond (Tr. 131).

D. Testimony of Willie Bond

Mr. Bond, who is 49, was born in Gates, North Carolina and continues to live there (Tr. 136). When he left school, he immediately went to work for the shipyard, where he worked from June 26, 1972 to January 27, 1998 as a painter (Tr. 136).

Mr. Bond was hurt on the job on January 22, 1998 while moving a work bench in order to paint it. When he moved the work bench, he heard or felt something snap, hurting his back (Tr. 137). Dr. Kerner was the first to operate on his low back (Tr. 137). His second surgery was by Dr. Magness, who found that there were problems on both sides of Mr. Bond's low back (Tr. 138). Dr. Magness never told him to go back to work (Tr. 138).

When Dr. Magness retired, Dr. Molligan became Mr. Bond's treating physician (Tr. 138-9). Mr. Bond has been seeing Dr. Molligan for about the last two and one half years (Tr. 139). Dr. Molligan recommended that Mr. Bond have a third operation, a fusion, which involves putting rods and screws in his back (Tr. 139). Mr. Bond declined the third surgery because the two other operations were unsuccessful from his point of view (Tr. 139-40).

Dr. Molligan accepted Claimant's decision not to have surgery (Tr. 140). The shots Dr. Molligan prescribed for Claimant's back do not do Mr. Bond much good (Tr. 140). When Mr. Bond last saw Dr. Molligan, the latter said that eventually Claimant would have to have surgery, but Claimant is hesitating (Tr. 140).

The shipyard cut off all of Mr. Bond's compensation on April 7, 2000 (Tr. 140-1).

Claimant described pain in his lower back and pain that goes down both legs (Tr. 141). He does not sleep and he had only slept two hours the night before (Tr. 141). A couple of nights before, he did not sleep at all (Tr. 142). The cane that Mr. Bond uses was prescribed by Dr. Kerner back in 1998 (Tr. 142). Claimant says that he needs the cane because at times his legs will give out on him (Id.). Before he got the cane, when his legs would give out, he would fall (Id.).

When Mr. Bond first realized that there was something unusual about his hands and wrists, he went to his family physician, Dr. Waller, in about 1998 (Tr. 142). Claimant did not lose work time because of his hands and wrists, but his hands caught and went numb because he used a paint brush and scraper every day, and he also had to hold paint cans. His hands and wrists would go numb, he could not grasp anything, and he dropped paint brushes (Tr. 143).

Mr. Bond's mail box is 12 miles from his house. He can drive to it, but because of his pain, Mr. Bond does not drive further than that. For the last four years, his brother-in-law has been driving him anywhere he has to go beyond the mail box. On days when Mr. Bond has a lot of pain, he just takes pain pills and lies down on the sofa or bed (Tr. 144).

Claimant does not know how to use a cash register. He does not think that he could stand for three or four hours a day (Tr. 145). Mr. Bond remembered getting some mail from Expediter. He did not fill out the form from Expediter because he did not understand it. No one from Expediter ever called him (Tr. 145). Because of the pain, Mr. Bond does not think he can do any work (Tr. 145).

Because he is in pain all the time, Mr. Bond has not looked for a job (Tr. 151). He did not apply for those jobs that Mr. Kay sent him in the mail because he did not feel that he could do them (Tr. 158). Also, Claimant did not believe that he could drive that far to the job (Tr. 158-9). In four and one half years Mr. Bond has not driven more than twelve miles from his house, except for one time right after the accident when he drove to Newport News to see Dr. Nevins (Tr. 161).

Mr. Bond saw a surveillance film in which someone was cleaning out a car (E 77), and he indicated that it was not he doing it but his brother (Tr. 167-70).

Mr. Bond only drives to his mail box about once a week, and his brother often picks

up the mail for him (Tr. 172). Mr. Bond can only drive about 20 minutes before he has to get out of his car (Tr. 173).

Mainly because of the pain, Mr. Bond does not think he could do the Expediter job (Tr. 173-4).

E. Testimony of Curle Smith

Mr. Smith is Willie Bond's brother-in-law. He drove Mr. Bond to his lawyer's office the day before the hearing (Tr. 175). Mr. Smith has been driving Mr. Bond ever since the latter was hurt (Tr. 175-6). As far as Mr. Smith knows, Mr. Bond only drives as far as his own mail box (Tr. 176).

Mr. Smith saw the surveillance tape (E 77) the day before the hearing and testified that the person in the front seat was Willie Bond's younger brother (Tr. 176). Claimant was not inside the car cleaning it (Tr. 176). Mr. Willie Bond did not clean out the car, and Mr. Smith has never seen Willie Bond clean out a car (Tr. 177).

From observing him, Mr. Smith says that Claimant is in a lot of pain. He bases this conclusion on observations of how Mr. Bond moves around, sits down, and gets up (Tr. 177). Mr. Smith has observed Mr. Bond lying on the sofa or in bed because of his pain in the middle of the day (Tr. 180).

DISCUSSION

A. Carpal Tunnel Syndrome

The first question is whether Claimant suffered an on-the-job injury to his wrists. Although the burden of demonstrating causation is on Claimant, he may be aided by a presumption in section 20(a) of the act, which provides that, "in any proceeding of enforcement of a claim for compensation under this act, it shall be presumed, in the absence of substantial evidence to the contrary - (a) that the claim comes within the provisions of the act...." In order to obtain the benefit of the presumption, Claimant must establish that he suffered some harm or pain and that an accident occurred or working conditions existed which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981). The record is clear and uncontradicted that Claimant suffered harm to his wrist (CX 12). In addition, Dr. David Waller stated that, in his opinion, Claimant's work could have caused his wrist disabilities (CX 8-9).

Thus, I find that Claimant has made a prima facie case that his bilateral carpal-tunnel syndrome was work related. For that reason, Claimant has successfully invoked

the section 20(a) presumption, and the burden of proof shifts to Employer to go forward with countervailing evidence to rebut the presumption that the injury was caused by Claimant's shipyard employment. Swinton v. J. Frank Kelly, Inc., 554 F. 2d 1075,1082 (D.C. Cir.), cert. denied, 425 US 870 (1976).

Employer persuasively argues on brief that it has rebutted the section 20(a) presumption with substantial evidence that Claimant's bilateral carpal-tunnel syndrome is not work-related (brief at 15-16). In his brief, Claimant does not argue to the contrary. I agree with Employer. Dr. Waller's statement that Claimant's employment could have caused his carpal tunnel syndrome is sufficient to invoke the presumption in section 20(a), but the statement of Dr. Kerner, Claimant's treating surgeon, that Mr. Bond's carpal tunnel syndrome is not work-related (E 25 at 11; E 33) is sufficient to rebut the presumption. Dr. Bergfield, another of Claimant's surgeons, agreed (E 52). In light of the fact that there is no medical evidence of work-related causation other than the statement of Dr. Waller of a possible connection persuades me that a) Employer has rebutted the presumption; b) once the presumption has dropped out of the case, Claimant has failed to satisfy its burden of proof; and c) Mr. Bond's claim concerning the 1999 bilateral wrist injury (OWCP No. 5-106358) must be denied.[4]

B. Suitable Alternative Employment

To establish entitlement to total disability benefits under the act Claimant bears the burden of establishing a prima facie case of total disability by showing that he cannot return to his usual employment due to his work-related injury. Trans-State Dredging Co. v. Benefits Review Board (Tarner), 731 F.2d 199 (4th Cir. 1984). If Claimant meets this burden, the burden shifts to Employer to show the availability of realistic job opportunities in Claimant's geographic area, which Claimant, by virtue of his "age, background, employment history and experience, and intellectual and physical capabilities," is capable of performing and could secure if he diligently tried. Id, 731 F.2d at 201 quoting New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-1043 (5th Cir. 1981). Furthermore, to determine whether a job opportunity is realistic, Employer must elicit "the precise nature, terms, and actual availability" of the position. Thompson v. Lockheed Shipbuilding and Construction Co., 21 BRBS 94, 97 (1988) citing Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687 (5th Cir. 1986), cert. denied, 107 S. Ct. 101 (1987). Finally, Employer must demonstrate the availability of a range of jobs, not just one. Lentz v. Cottman Co., 852 F.2d 129 (4th Cir. 1988).

[4] My denial of the wrist-injury claim does not affect my subsequent analysis concerning the existence of suitable alternative employment because I must take Claimant's wrist injuries into account regardless of their cause. An employer takes a worker as it finds him. In deciding suitability of jobs, I must consider all ailments (however caused) of which Employer is or should be aware. Crum v. General Adjustment Bureau, 738 F. 2d 474 (D.C. Cir. 1984).

The parties have stipulated that Claimant cannot return to his usual employment due to his back injury (Stipulation no. 7). Therefore, the burden of proof shifts to Employer to demonstrate the existence of suitable alternative employment in Claimant's area. Tarner, supra. To meet its burden, Employer has submitted the labor market survey of William Kay and the testimony of Amy Lanman-Bouchard. Together they identified ten jobs which, they testified, were available between 1999 and 2002 and which Claimant could have obtained and performed had he diligently tried (see list, supra, at p.). These jobs all fall in to one of the following categories: 1) unarmed security guard, 2) cashier, 3) greeter, 4) attendant, and 5) telephone surveyor (E 57, E 75). In rebuttal, Carl Hanbury, Claimant's vocational expert, testified that Claimant is essentially unemployable and has no wage-earning capacity (Tr. 131).

I find that six of the ten identified positions have been shown to be suitable. Those not so shown include the Expediter (Decenzo) telephone surveyor position. As I noted at the hearing (Tr. 190), Claimant is not an articulate individual. The telephone surveyor job requires a certain amount of articulateness and gregariousness, which I find to be absent in Mr. Bond. I understand that he would essentially be assigned to read a script, but he would also have to react to and follow up on answers and questions.[5]

In addition, the Alpha Security job was not approved by Claimant's treating surgeon, Dr. Kerner (E 60 at 5). Therefore, I find that it too has not been shown to be suitable. Finally, Dr. Mark Ross, Employer's consulting physiatrist, disapproved the Ahoskie Wal Mart greeter position and the Murfreesboro Food Lion job (E 76 at 4, 11). Therefore, I find that these positions have also not been shown to be suitable.

All other positions have been shown to be suitable. All were approved by one or more of the following physicians: Dr. Hersh (E 65); Dr. Kurowski (E 66); Dr. Kerner (E 60); and Dr. Ross (E 76). None was disapproved by any physician. All of the employers had openings at some (although not all) times during the critical period (1999-2002) (E 75, E 57).

Claimant argues that he is in too much pain to perform these jobs. Four examining and/or treating physicians have opined to the contrary, and I have no reason to credit Claimant over these physicians.

Insofar as his mathematical skills are concerned, I find that, because Claimant can perform math at least a fifth grade level (Tr. 97), he can perform a cashier job (E 57 at 6,

[5] Because I have found that this job has not been shown to be suitable, I do not reach the issue of whether or not this subsidized position is a "real" job. Despite the fact that the telephone surveyor job has not been proven suitable, I find that Claimant is sufficiently articulate to perform the job of Wal Mart greeter.

12-13).[6] Other than an alleged lack of mathematical skills, the objections of Claimant's vocational expert, Mr. Hanbury, are based on Claimant's physical limitations, which all opining physicians seem to have agreed do not rule out these jobs.

Claimant alleges that he cannot drive more than forty minutes without experiencing significant pain (Tr. 86). However, Dr. Ross, the physiatrist, testified without contradiction by any other physician that Claimant can drive one hour to work (E 68). I credit Dr. Ross over Claimant.

Because Mr. Hanbury consistently relied on Claimant's opinion of his own capabilities over the opinions of Claimant's doctors, I credit Mr. Kay's opinion over that of Mr. Hanbury.

As a result of the above analysis, I find that Employer has established the existence of suitable alternative employment (in the form of a range of jobs) in Claimant's area which Claimant could obtain and perform if he tried.

Despite the fact that suitable alternative employment exists, Claimant may nevertheless be deemed totally disabled if he has diligently tried but been unable to secure employment. Tarner, supra. Although I cannot fault Claimant for not applying for the Decenzo position, as I have found that it has not been proven suitable, the record does show that Claimant has not applied for any job in almost five years (Tr. 129-30, 137). Thus, I must conclude that he has not demonstrated diligence.

Therefore, I find that Claimant has a residual wage-earning capacity. Based on the Decenzo position, Mr. Kay asserted that Claimant could earn $7.00 an hour (E 57 at 13). However, as I have found that this job was not shown to be suitable, I find that Claimant's wage-earning capacity is $5.56 per hour or $222.40 per week (Id.). This is based on an average of suitable positions, a method used by Mr. Kay (E 57 at 13). This also reflects what the jobs paid as of the date of injury (Tr. 72-4). No one has suggested a different method of calculating wage-earning capacity.

ORDER

[6] William Kay, Employer's vocational expert, opined that Claimant can perform math at the sixth-grade level (Tr. 82). Either level of mathematical ability should suffice to enable Claimant to operate a cash register. Mr. Hanbury did not specifically contradict Mr. Kay on this point (CX 3).

It is hereby ORDERED as follows:

1. Employer shall pay Claimant permanent partial disability compensation at a rate of $274.43 per week for the period January 22, 1998 to the present and continuing (($633.84 - $222.40) x 2/3).

2. Employer is entitled to a credit for any previous payments made to Claimant in compensation for his 1998 and his 1999 injuries.

3. Mr. Bond's claim with respect to his carpal tunnel syndrome (5-106358) is DENIED.

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FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

FEC/lpr
Newport News, Virginia

NOTE: The outcome of this case does not constitute a "successful prosecution" within the meaning of the act. Claimant and Employer are not liable to Claimant's counsel for any attorney's fees for services rendered, either before this office or that of the district director, in connection with this claim. 33 USC 928; Director, OWCP v. Hemingway Transport, Inc., 1 BRBS 73, 75 (1974). *Actual or attempted receipt of attorney's fees for an unsuccessful prosecution may be a violation of federal criminal statutes and may be grounds for debarring an attorney from pursuing any claim before the United States Department of Labor.* 33 USC 928 (e), 931 (a), (b)(2)(B)(ii); 20 CFR 702.131 (c)(2), 702.432-702.436. Any such actual or attempted receipt of fees should be promptly reported to this office or the district director. However, if Claimant's counsel believes that a good faith claim exists for attorney's fees in this matter, a petition should be filed with the office before which the work was performed.